

OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: March 24, 2022, 3:00 p.m.
State Capitol, Conference Room 016 and Via Videoconference

Re: Testimony on S.C.R. No. 192 / S.R. No. 191
Requesting The Office of Information Practices to Convene a
Working Group to Develop a Recommendation for a Statutory
Standard for the Treatment of Deliberative and Predecisional Agency
Records

Thank you for the opportunity to submit testimony on this resolution, which asks the Office of Information Practices (OIP) to convene a working group to develop a consensus on language for a new Uniform Information Practices Act, chapter 92F, HRS (UIPA), exception for deliberative and pre-decisional records, and to report the group's findings and recommendations to the Legislature. **OIP supports this resolution** and would be happy to undertake the proposed working group.

The now-defunct "deliberative process privilege" (DPP) formerly allowed agencies to withhold many deliberative and pre-decisional materials from public disclosure under the UIPA, and in doing so, supported agencies' ability to freely and frankly discuss options in the course of making decisions and on public access to deliberative materials. The proposed working group would reflect a balance of viewpoints and would be a useful forum for working out a new exception

that would support agencies' ability to have frank internal discussions while still appropriately protecting the public interest in disclosure.

Based on the Federal Freedom of Information Act (FOIA), caselaw, and the UIPA's own legislative history, for nearly 30 years the Office of Information Practices recognized DPP as a form of the UIPA's exception to disclosure for records whose disclosure would frustrate a legitimate government function, section 92F-13(3), HRS. In 2018, though, the Hawaii Supreme Court overturned that interpretation in a close 3-2 decision in Peer News LLC v. City and County of Honolulu, 143 Haw. 472, 431 P.3d 1245 (2018).

When it was still recognized, the DPP did not automatically protect from disclosure all records simply because they are labeled "drafts" or because they were determined to be "predecisional and deliberative," and OIP's opinions over time had significantly limited the DPP's application. For example, the DPP could not be used to withhold purely factual portions of a report (OIP Op. Ltr. No. 90-11), or portions of a draft document that were substantially discussed at a public meeting where the DPP had been waived (OIP Op. Ltr. No. 91-22). **OIP also implicitly recognized the need to balance competing interests to avoid having the DPP swallow the UIPA's disclosure requirements** in later opinions, such as OIP Opinion Letter No. 95-24. **Even the appellant in Peer News cited this opinion and argued that "OIP also has indicated support for the deliberative process privilege as a 'qualified privilege' that requires balancing against the public interest in disclosure" and "the need to balance the public interest in disclosure falls squarely within the Legislature's intent."** Although the dissenting opinion in Peer News urged the court to explicitly adopt a balancing test, the majority rejected the DPP altogether and thus no form of DPP is currently recognized under the UIPA.

The proposed working group would be an opportunity to clarify the UIPA's treatment of deliberative and predecisional records and restore agencies' ability to withhold some deliberative material, but in a way that balances the agency's ability to reach sound and fair decisions against the public interest in disclosure. While any form of DPP would represent a limitation of public access to agencies' internal deliberative records, it would also benefit agencies by allowing them to avoid opening up their internal deliberations on prospective decisions when doing so would harm the agency's ability to make good decisions more than it would benefit the public access interest.

OIP is happy to convene the proposed working group, representing different perspectives on this issue. OIP shares the Legislature's goal of finding a reasonable balance between agencies' ability to have some room to fully and frankly discuss proposed policies or tentative decisions outside the glare of publicity and to be able to make fully informed decisions in the public's interest, while also allowing access to materials when the public interest is equal to or stronger than the potential harm to the agency.

Thank you for considering OIP's testimony.

Statement Before The
SENATE COMMITTEE ON GOVERNMENT OPERATIONSThursday, March 24, 2022
3:00 PM
Conference Room 016 and Videoconferencein consideration of
SCR 192 / SR 185**REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP A
RECOMMENDATION FOR A STATUTORY STANDARD FOR THE TREATMENT OF DELIBERATIVE AND
PREDECISIONAL AGENCY RECORDS.**

Chair MORIWAKI, Vice Chair DELA CRUZ, and Members of the Senate Government Operations Committee

Common Cause Hawaii supports SCR 192 / SR 185 requesting the office of information practices to convene a working group to develop a recommendation for a statutory standard for the treatment of deliberative and predecisional agency records.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening our representative democracy through transparency and accountability reforms efforts that increase civic engagement and public participation in our democratic processes.

Common Cause Hawaii appreciates the convening of “interested stakeholders to consider whether there is consensus on the appropriate balance between transparency and deliberative process for effective agency decision-making in Hawaii, and to recommend a new statutory standard that balances the various agency and public interests”. See SCR 192 at page 2, lines 13-18, SR 185 at page 2, lines 10-15.

Further, Common Cause Hawaii would welcome the opportunity to be part of “a working group [convened by Office of Information Practices] to develop a consensus on language for a new UIPA exception for agency records that are deliberative and pre—decisional which reasonably balances the public's interest in disclosure against the potential harm to the agency's ability to fully consider and make sound and informed decisions”. See SCR 192 at page 2, lines 24-28, SR 185 at page 2, lines 19-24.

As a nonprofit interested in increasing government transparency and accountability, Common Cause Hawaii hopes to add value to a working group established by SCR 192 / SR 185.

Thank you for the opportunity to testify in support of SCR 192 / SR 185. If you have any questions, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



March 24, 2022

Sen. Sharon Y. Moriwaki
Senate Government Operations Committee
State Capitol
Honolulu, HI 96813

Chair Moriwaki and Committee Members:

Re: SR 185/SCR 192

We support these two measures and ask you to recommend that the Civil Beat Law Center be represented in the working group.

The issue of deliberative process is far too complex to work out in one bill during a legislative session.

Thank you for your time and attention,

Stirling Morita
President
Hawaii Chapter of the Society of Professional Journalists

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Senate Committee on Government Operations
Honorable Sharon Y. Moriwaki, Chair
Honorable Donovan M. Dela Cruz, Vice Chair

RE: Testimony Commenting on S.C.R. 192, Requesting the Office of Information Practices to Convene a Working Group to Develop a Recommendation for a Statutory Standard for the Treatment of Deliberative and Predecisional Agency Records

Hearing: March 24, 2022 at 3:00 p.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **commenting on S.C.R. 192**.

The Law Center would appreciate the opportunity to work collaboratively with government agencies “with the goal of developing a consensus” on public access to deliberative government records. Enacting the deliberative process privilege would be a disaster for Hawai‘i because that doctrine is excessively secretive and prone to abuse by government agencies. To the extent that there are legitimate concerns about disclosure of deliberative records, however, the Law Center is willing to explore solutions targeted at those concerns while respecting the public’s right to know how its government operates, including deliberations.

Thank you again for the opportunity to provide comments on S.C.R. 192.



SENATE COMMITTEE ON GOVERNMENT OPERATIONS
Thursday, March 24, 2022, 3 pm, State Capitol Room 016 & Videoconference
SCR 192 & SR 185

REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO
DEVELOP A RECOMMENDATION FOR A STATUTORY STANDARD FOR THE TREATMENT OF
DELIBERATIVE AND PREDECISIONAL AGENCY RECORDS

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Moriwaki and Committee Members:

The League of Women Voters of Hawaii would appreciate the opportunity to participate in an OIP working group to make recommendations concerning public access to deliberative and pre-decisional government records. Our perspective is that early, informed, public involvement in government deliberations usually leads to better outcomes and more consensus than secretive, top-down "Decide, Announce, Defend" government decisions.

Thank you for the opportunity to comment.